

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ILLINOIS

In Re)	In Bankruptcy
)	
LWMCK CORPORATION d/b/a)	
National Building Systems)	No. 95-30157
)	
Debtor.)	
)	
DONALD HOAGLAND, Trustee,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 96-3036
)	
DENK & ROCHE BUILDERS, INC.,)	
)	
Defendant.)	

ORDER

This matter came before the Court on Defendant's Second Motion for Summary Judgment, Plaintiff's Memorandum in Opposition thereto, and Defendant's Reply to Plaintiff's Memorandum in Opposition, and the Court, , having read the pleadings, having reviewed the relevant statutory and precedential authority including Judge Foreman's Memorandum and Order and Amended Judgment, and being otherwise fully advised in the premises finds as follows:

1. Defendant asserts that the defenses of contemporaneous exchange for new value and subsequent new value under Sections 547 (c) (1) and 547 (c) (4) of the Bankruptcy Code defeat as a matter of law any avoidance actions initiated by Plaintiff.

2. Section 547(c) (1) of the Bankruptcy Code provides as follows:

- (c) The trustee may not avoid under this section a transfer -
 - (1) to the extent that such transfer was

- (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
- (B) in fact a substantially contemporaneous exchange(.)

3. By its very terms, Section 547 (c) (1) provides that the intent of the debtor and the creditor is an essential element for finding a new value exception to a preferential transfer. Whether the parties intended that any exchange of value was contemporaneous is a question of fact which precludes summary judgment in this case.

4. Judge Foreman's Memorandum and Order entered January 13, 1998, points out that "(i)t is very clear, at least in the Seventh Circuit, that a release from contractual obligations does not constitute 'new value' under §547." Memorandum at p. 23. *See also In re Energy Co-op, Inc.*, 832 F.2d 997, 1003 (7th Cir. 1987). Judge Foreman's Amended Judgment entered February 5, 1998, further states "(w)hether the 'new value' issue requires a full evidentiary hearing on remand turns on whether D&:R has anything other than Debtor's release from its contractual obligation to offer in support of its argument." Amended Judgment at p. 2. Defendant's Second Motion for Summary Judgment is not sufficiently specific as to how and to what extent any new value given *to Debtor* constitutes anything other than the release from a contractual obligation. In fact, the purported benefits conferred upon the Debtor as set forth on page 10 of Defendant's Second Motion for Summary Judgment and discussed throughout appear to be nothing other than benefits arising as a result of the Debtor's being released from a contractual obligation.

5. Defendant makes a number of factual allegations, many of which are supported by affidavit, which could and probably would be refuted by Plaintiff once the Plaintiff has had the opportunity to conduct additional discovery. Accordingly, it would be inappropriate to accept Defendant's facts as true while Plaintiff continues to assert its desire to conduct additional discovery.

IT IS THEREFORE ORDERED that Defendant's Second Motion for Summary Judgment be and is hereby denied.

ENTERED: July 6, 1998

/s/ LARRY LESSEN
UNITED STATES BANKRUPTCY JUDGE